No. 16324

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FREDERICK SILBAUGH,

Appellant,

vs.

P. G. SMITH,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE W. KELL,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 16324

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FREDERICK SILBAUGH,

Appellant,

vs.

P. G. SMITH,

Appellee.

BRIEF OF APPELLEE.

A.

Statement of Jurisdiction.

This appeal arises from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty under two counts of a seven-count indictment upon his plea of guilty. The indictment charged violations of Title 18, United States Code, Section 2312, transportation of stolen motor vehicles in foreign commerce. The violations occurred in San Diego County, California, within the Southern Division of the Southern District of California.

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231. This court has jurisdiction to entertain this appeal and to review the questions raised herein under the provisions of Title 28, United States Code, Sections 1291 and 1294.

B.

Statement of the Case.

Upon his plea of guilty, appellant was convicted of offenses under Title 18, United States Code, Section 2312, as charged in counts one and four of the indictment [R. 20]. Appellant was thereupon ordered committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years on each of counts one and four, to run concurrently. The judgment is dated November 1, 1955 [R. 21].

Appellant had been brought into Federal Court under a writ of habeas corpus *ad prosequendum* dated September 21, 1955 [T. 10-11, Nov. 17. 1958]. The writ, itself, is not before this court, but there was never any dispute about the fact that appellant was in the County Jail at the time the Federal authorities required his presence [T. 8, Nov. 17, 1959; R. 6; Appellant's Op. Br. pp. 21, 27]. Following his appearance in Federal Court for judgment and sentence, appellant was returned to the California State Authorities and subsequently pleaded guilty to two counts of grand theft. He was committed by the California Authorities for service of his sentence, as may be gathered from R. 18 and 19. He was released by the Department of Correction, State of California, "subject to hold" [R. 23] and was thereupon taken into custody by the United States Marshal on December 16, 1957, and delivered to the Federal Correctional Institution at Terminal Island, California, for service of his Federal sentence [R. 22].

Appellant was released from Terminal Island on February 18, 1959, but is still on parole.

While in custody at Terminal Island in service of his Federal sentence, appellant filed a motion under Title 28,

United States Code, Sentence 2255, entitled "Motion to Enforce Original Judgment, Sentence, and Commitment." That motion was denied on October 24, 1958.

Appellant subsequently filed the petition for writ of habeas corpus [R. 2] which forms the basis for the present appeal. Although appellant attempts to distinguish between the original motion under Title 28, United States Code, Section 2255, and the petition for writ of habeas corpus (p. 2 of the motion for consolidation of appeals attached to Appellant's Op. Br.) the identical contentions were expressed in the petition for the writ of habeas corpus as had already been passed upon in the earlier motion.

Although there was apparently good grounds for dismissal of the petition for writ of habeas corpus, the District Court considering the matter permitted appellant to appear and argue his contention. The petition for writ of habeas corpus was denied on November 20, 1958 [R. 50].

C.

Statutes Involved.

Section 2255 of Title 28, United States Code, provides in pertinent part as follows:

> "A prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence . . . was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * * * * *
>
> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Section 2243, Title 28, United States Code, pertaining to hearings on applications for writs of habeas corpus, provides in pertinent part as follows:

> "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

ARGUMENT.

I.

The Application for Writ of Habeas Corpus Was Used as a Substitute for an Appeal From the Order Denying Appellant's Motion for Relief Under Title 18, United States Code, Section 2255.

An application for a writ of habeas corpus should not be entertained where it appears that the applicant has failed to apply for relief under Title 18, United States Code, Section 2255, or, having so applied, has been denied relief thereunder, unless it appears that the remedy thereunder is inadequate or ineffective to test the legality of detention.

18 U. S. C., Sec. 2255.

A denial of a motion to vacate judgment under Section 2255 gives the moving party no right to resort to habeas corpus inasmuch as his remedy is by appeal.

Meyers v. United States, 181 F. 2d 82, 84 (C. A. D. C., 1950);

In re Del Marmol, 221 F. 2d 565 (C. A. 9, 1955).

The District Court should have dismissed appellant's application for writ of habeas corpus.

Meyers v. United States, supra.

This court has held that the District Court is *without jurisdiction* to issue a writ of habeas corpus where the motion under Section 2255 has been denied.

Madigan v. Wells, 224 F. 2d 577 (C. A. Cal.), cert. den. 351 U. S. 911.

Accordingly, this appeal should be dismissed.

II.

As to the Merits, It Is Clear That Appellant Was Entitled to No Relief Inasmuch as the Federal Authorities Could Not Assert Jurisdiction Over Appellant's Person for Service of His Sentence Until December 16, 1957, When He Was Released From State Custody.

There has never been any dispute on the question of where petitioner came from when he was first brought into Federal court. He was in the Los Angeles County Jail [R. 6]. Appellant has apparently concluded that some distinction must be made in his case because he was in the custody of "municipal authorities," as distinguished from "state authorities" (Appellant's Op. Br.

pp. 21 and 27). Of course, this contention requires no answer. It was the sovereign state of California which was asserting its jurisdiction over the person of appellant, regardless of where he was held in custody.

The Federal sentence did not begin to run until December 16, 1957, when appellant was taken into custody by the United States Marshal for service of his Federal sentence from the State of California, which had exhausted its jurisdiction over the body of the appellant at that time.

Dunton v. Squier, 185 F. 2d 470 (C. A. 9);
Hayward v. Looney, 246 F. 2d 56 (10th Cir.);
United States v. Hough, 157 Fed. Supp. 771.

Conclusion.

The appeal from the order denying appellant's application for writ of habeas corpus should be dismissed. Appellant's "motion for consolidation of appeals" should likewise be dismissed for the reason that he has not prosecuted his appeal from the order denying his motion under Title 28, United States Code, Section 2255.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE W. KELL,
Assistant U. S. Attorney,
Attorneys for Appellee.